

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

_____	)	
PHONE.COM, LLC; ESCOM, LLC,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 08-cv-11717-WGY
	)	
SOVEREIGN BANK,	)	
	)	
Defendant.	)	
_____	)	

PLAINTIFFS' MOTION TO COMPEL  
PRODUCTION OF BOULAY REPORT AND CASE NOTES

The Plaintiffs hereby respectfully request that the Court order the Defendant to product to the Plaintiffs forthwith a full and complete copy (including any attachments) of the investigative report on this matter drafted by the Defendant's employee Ms. Laura J. Boulay ("Boulay") as well as her case notes.

As shown in the Memorandum In Support of this Motion, Boulay (who is a not an attorney) apparently drafted and internally circulated her investigative report in or about October 2008 following her investigation of this matter – which investigation was memorialized in her case notes and included conversations with Defendant's employees and review of bank account information. The Defendant repeatedly refused to produce this report and case notes to Plaintiffs in discovery (even though they were within the scope of the Plaintiffs' document requests and also came within the scope of the Defendant's initial disclosures required under Fed. R. Civ. P. 26a)(1)(A)(ii))) on the grounds that they were protected by the work product doctrine.

However, any work product protection for these highly relevant non-attorney documents was waived or otherwise lost when Boulay reviewed her report and case notes in preparation for

her deposition in this matter, especially since the Defendant will be calling Boulay at trial to testify.

The denial of this motion to compel would deny the Plaintiffs the ability to effectively cross-examine Boulay at trial on crucial credibility and memory matters, and thus would be contrary to the interests of justice. See Fed. R. Evid. 612; Heron Interact, inc. v. Guidelines, Inc., 244 F.R.D. 75 (D. Mass. 2007) (Neiman, C.M.J.); Derderian v. Polaroid Corporation, 121 F.R.D. 13 (D. Mass. 1998) (Collings, M.J.).

Additional grounds for the granting of this Motion are contained in the Memorandum filed by the Plaintiffs in support of this Motion.

In the alternative, and without waiving the Plaintiffs' claim that Boulay's entire report and case notes should be produced, the Plaintiffs respectfully request that the Court review the report and case notes *in camera* and order the Defendant to produce to Plaintiffs as much of the report and case notes as possible, consistent with the interests of justice.

Respectfully submitted,

PHONE.COM, LLC; and ESCOM, LLC;

By their attorneys,

/s/ Geoffrey R. Bok

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Dated: January 19, 2010

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

I hereby certify that I have complied with Local Rule 7.1 by conferring on January 8, 2010 with the Defendant's Patrick Kennedy, Esquire, in a good faith effort to resolve or narrow the issues in this Motion.

/s/ Geoffrey R. Bok

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically today to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Geoffrey R. Bok